



# ACQUISITION LETTER

## AUTHORITY

This Acquisition Letter (AL) is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Department of Energy Acquisition Regulation (DEAR) subsection 901.301-70.

\*\*\*\*\*

## CONTENTS

### CITATION

### TITLE

909.5	Organizational Conflicts of Interest
952.209-8	Organizational Conflicts of Interest-Disclosure
952.209-72	Organizational Conflicts of Interest

- I. **Purpose.** The purpose of this AL is to provide guidance concerning the Department's organizational conflicts of interest (OCI) policy and procedures in light of the repeal of section 33 of the Federal Energy Administration Act of 1974 (15 U.S.C. 789) and section 19 of the Federal Non-nuclear Energy Research and Development Act of 1974 (42 U.S.C. 5918) by section 4304 of the Federal Acquisition Reform Act of 1996 (FARA), Pub. L. 104-106.
- II. **Background.** With the repeal of the two statutes that formed the basis for the Department's OCI program, the Department of Energy is now subject to the regulatory OCI program set forth in Subpart 9.5 of the Federal Acquisition Regulation (FAR). Based on an internal review comparing the current DOE system to the FAR system, the Department has determined there are several important elements in the current DOE program which should be retained. A proposed rule is being developed for publication in the Federal Register which will codify and make mandatory the Department's new program in the DEAR. This Acquisition Letter provides the basic tenets of the new program.
- III. **Guidance.** Contracting activities shall use the policy and procedures set forth at FAR Subpart 9.5. The following procedures should also be used pending the issuance of a final rule.



Waiver Authority. The waiver authority of FAR 9.503 is delegated to Heads of Contracting Activities.

Solicitation and Disclosure. As described in the FAR, the DOE system will apply to contracts for advisory and assistance services expected to exceed the simplified acquisition threshold. Attachment 1 to this AL is a model solicitation provision that should be used in place of the solicitation provision at FAR 52.209-8. The model provision limits the period subject to disclosure to twelve months. It does not require affiliates of the offeror to provide disclosures, and it does not require a certification by the offeror.

Evaluation of Interests and OCI Determination. Contracting officers should evaluate the disclosure statement and other available, credible information with regard to the apparent successful offeror, or where individual contracts are negotiated with all firms in the competitive range, all such firms, to determine if an actual or significant potential organizational conflict of interest exists. That determination should be made in writing for each award of a contract for advisory and assistance services expected to exceed the simplified acquisition threshold.

If the contracting officer determines that an organizational conflict of interest would exist which cannot be avoided, neutralized, or mitigated to the contracting officer's satisfaction, the firm may be disqualified. However, before determining to withhold award, the contracting officer should notify the proposer, provide the reasons therefor, and allow the proposer a reasonable opportunity to respond. If the contracting officer finds that it is in the best interests of the United States to award the contract notwithstanding a conflict of interest, a request for waiver should be submitted in accordance with 9.503.

Contract Clause. Contracting officers should include the model clause provided as Attachment 2 in contracts for advisory and assistance services exceeding the simplified acquisition threshold. The clause may be modified as necessary to address organizational conflicts of interest issues in individual contracts.

Subcontracts. The model clause reflects that organizational conflicts of interest concerns flow down to subcontracts for advisory and assistance services which are expected to exceed the simplified acquisition threshold. The DOE contracting officer will no longer make the OCI

determination for subcontracts. The contractor or next higher tier subcontractor is required by the terms of the clause to obtain a disclosure statement from the subcontractor and is authorized to make the determination and to avoid, neutralize, or mitigate any actual or significant potential organizational conflict of interest. Only if the actual or significant potential organizational conflict of interest cannot be avoided or neutralized is the contractor or next higher tier subcontractor required to obtain the DOE contracting officer's approval.

For existing contracts that contain the organizational conflicts of interest clause currently found at 952.209-72, Organizational Conflicts of Interest - Special Clause, or the predecessor clause, contracting officers may enter into negotiations with the contractor to modify the contract to replace paragraph (d) of the clause with paragraph (d) of the model clause at Attachment 2.

DOE Order 4220.4. Effective on the date of issuance of this AL, the policy and procedures set forth in DOE Order 4220.4 may be waived for application to existing and future contract awards.

- IV. **Effective Date**. This AL is effective on the date of issuance.
- V. **Expiration Date**. This AL will remain in effect until the DEAR is amended as necessary to reflect the guidance provided above.

MODEL PROVISION FOR 952.209-8

ORGANIZATIONAL CONFLICTS OF INTEREST DISCLOSURE - ADVISORY AND ASSISTANCE CONTRACTS (JUNE 1996)

(a) Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) An offeror notified that it is the apparent successful offeror shall provide the statement described in paragraph (c) of this provision. For purposes of this provision, "apparent successful offeror" means the proposer selected for final negotiations or, where individual contracts are negotiated with all firms in the competitive range, it means all such firms. The requirements of this provision apply individually to any of the proposer's identified consultants or subcontractors that also furnish advisory and assistance services in performance of this contract.

(c) The statement must contain the following:

(1) Name of the agency and the number of the solicitation in question.

(2) The name, address, telephone number, and federal taxpayer identification number of the apparent successful offeror.

(3) A description of the nature of the services rendered by or to be rendered on the instant contract.

(4) A statement of any past (within the past twelve months), present, or currently planned financial, contractual, organizational, or other interests relating to the performance of the statement of work. For contractual interests, such statement must include the name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12 months preceding the date of the statement, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable. For financial interests, the statement must include the nature and extent of the interest and any entity or entities

involved in the financial relationship. For these and any other interests enough such information must be provided to allow a meaningful evaluation of the potential effect of the interest on the performance of the statement of work.

(5) A statement that no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated as part of the statement required by (b) above.

(d) Failure of the offeror to provide the required statement may result in the offeror being determined ineligible for award. Misrepresentation or failure to report any fact may result in the assessment of penalties associated with false statements or such other provisions provided for by law or regulation.

(End of provision)

MODEL CLAUSE FOR 952.209-72

ORGANIZATIONAL CONFLICTS OF INTEREST (JUNE 1996)

(a) Purpose. The purpose of this clause is to ensure that the contractor (1) is not biased because of its financial, contractual, organizational, or other interests which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) Scope. The restrictions described herein shall apply to performance or participation by the contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as "contractor") in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity.

(1) Use of Contractor's Work Product.

(i) The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited and unsolicited) which stem directly from the contractor's performance of work under this contract for a period of five years after the completion of this contract. Furthermore, unless so directed in writing by the contracting officer, the Contractor shall not perform any advisory and assistance services work under this contract on any of its products or services or the products or services of another firm if the contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for advisory and assistance services.

(ii) If, under this contract, the contractor prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the contracting officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the contractor from offering or selling its standard and commercial items to the Government.

(2) Access to and use of information.

(i) If the contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or data which has not been released or otherwise made available to the public, the contractor agrees that without prior written approval of the contracting officer it shall not: (A) use such information for any private purpose unless the information has been released or otherwise made available to the public; (B) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first; (C) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and (D) release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The contractor may use technical data it first produces under this contract for its private purposes consistent with subparagraphs (b)(2)(i)(A) and (D) of this clause and the patent, rights in data, and security provisions of this contract.

(c) Disclosure after award.

(1) The contractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this contract, occur during the performance of this contract, it shall make an immediate and full disclosure of such changes in writing to the contracting officer. Such disclosure may include a description of any action which the contractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the contractor was aware of facts required to be disclosed or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the contracting officer, DOE may terminate this contract for default.

(d) Subcontracts.

(1) The contractor shall include a clause, substantially similar to this clause, including this paragraph, in subcontracts expected to exceed the simplified acquisition threshold determined in accordance with 48 CFR (FAR) Part 13 and involving performance of advisory and assistance services as that term is defined at 48 CFR (FAR) 37.201. The terms 'contract,' 'contractor,' and 'contracting officer' shall be appropriately modified to preserve the Government's rights.

(2) Prior to the award under this contract of any such subcontracts for advisory and assistance services, the contractor shall obtain from the proposed subcontractor or consultant the disclosure required by 48 CFR (DEAR) 909.507-1, and shall determine in writing whether the interests disclosed present an actual or significant potential for an organizational conflict of interest. Where an actual or significant potential organizational conflict of interest is identified, the contractor shall take actions to avoid, neutralize, or mitigate to the satisfaction of the contractor the organizational conflict. If the conflict cannot be avoided or neutralized, the contractor must obtain the approval of the DOE contracting officer prior to entering into the subcontract.

(e) Remedies. For breach of any of the above restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this contract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Government may terminate the contract for default, disqualify the contractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this contract.

(f) Waiver. Requests for waiver under this clause shall be directed in writing to the contracting officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the contracting officer may grant such a waiver in writing.

(End of clause)